In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 233

JOSEPH NELLO SPINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11–15; C.A. 1–5)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1965. A petition for rehearing was denied on May 10, 1965. The petition for a writ of certiorari was filed on June 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "C.A." refers to the volume containing the opinion, judgment, and order of the court of appeals. "R." refers to the printed appendix setting forth the trial proceedings.

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QUESTION PRESENTED

Whether, in a trial for interstate travel between Chicago and Indiana in aid of an illegal gambling venture, it was reversible error for the government attorney to argue in his summation that petitioner took his orders from Chicago.

STATEMENT

In the United States District Court for the Northern District of Indiana, petitioner was tried by a jury on two counts charging interstate travel from Illinois to Indiana in order to promote and carry on an unlawful gambling operation, in violation of 18 U.S.C. 1952, and on two counts charging willful filing of false wagering tax returns, in violation of 26 U.S.C. 7206(1). He was convicted on all counts, was sentenced to concurrent terms of eighteen months imprisonment on each count, and was fined $3,000 (R. 256–257). The court of appeals unanimously affirmed the conviction.

The pertinent evidence demonstrated that on several occasions in early 1962 petitioner drove from his home in Chicago, Illinois, to a gambling establishment in East Chicago, Indiana (R. 61–72). When petitioner arrived at the establishment a "Monte" game began (R. 12–13). Petitioner stood near the table, watching the cards being dealt and the money being paid, and sometimes relieved one of the dealers while he took a brief rest (R. 13, 17). The dealers called to petitioner when they needed more money, and petitioner responded by placing stacks of bills

on the table beside them (R. 42, 53). He once referred to the stacks of currency in front of a dealer as his money (R. 13); and, when acting as dealer, he occasionally pocketed part of the dealer's currency reserve (R. 8). On numerous evenings, petitioner answered a telephone, then turned to one of the men present and told him it was "okay". The men thereupon went to the basement and returned with the equipment for a "Bollita" drawing (R. 13–19, 24). Under petitioner's direction the door was locked and the drawing conducted (R. 14, 16, 18, 24–25, 43), after which petitioner placed a telephone call and recited the winning number (R. 15). Telephone company records showed several calls between petitioner's home in Chicago and either the gambling establishment or the residence of one of the employees in Indiana (R. 55, 57–59, 127, 196).

An undercover agent of the Internal Revenue Service testified that petitioner had told him that the house "take" on the Monte game was 25%, and "that the Monte Game and the Bollita Game came out of Chicago" (R. 9). Petitioner also told the agent that if the dealers did not appear for work they would receive no pay, but "if he didn't come to work he would still get paid" (R. 12). Once the agent overheard petitioner and an employee discuss whether the proceeds of an evening's activity would be taken to Chicago that night or the next morning (R. 80, 82). The agent testified that, at a later date, some time after petitioner had moved from Chicago and had become a resident of Indiana, he showed a newspaper

with a headline about the "Syndicate in Chicago," and petitioner said he "was glad he was not in Chicago anymore, that he would stay here in Indiana" (R. 78). Petitioner, on cross-examination, denied that his "orders" came "from Chicago" (R. 226).

During his summation the government counsel argued (R. 233):

> * * * You heard Special Agents Poppa and Stevens testify that they trailed the defendant from Chicago to East Chicago, from Chicago, Illinois, to East Chicago, Indiana.
>
> Why he traveled is something that you have to decide—I can tell you why, the defendant takes his orders from Chicago——

Petitioner's counsel objected to this argument and was sustained (R. 233). At the conclusion of the summation a defense motion for a mistrial was denied (R. 238–239), but the court instructed the jury (R. 239):

> During the course of the argument there was some reference made by the United States Attorney to the effect that the defendant takes orders from Chicago. I instruct you to disregard that statement and not to consider it in any way in your deliberations, because it is outside the scope of the evidence in this case, and therefore should not be considered by you.

Additionally, during its general charge, the court instructed that "if counsel inadvertently * * * misstate the evidence * * * you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel."

(R. 252). The jury was admonished to give no consideration whatever to matters which had been stricken from the record (R. 253).

ARGUMENT

There is no merit to petitioner's contention that the final argument of the government attorney was so prejudicial as to require reversal. The only matter claimed to be offensive was the statement that petitioner "takes his orders from Chicago." Anything tending to explain the intent with which the trips were undertaken was relevant to the offenses charged in the first two counts. Since the statement represented a permissible inference from the evidence adduced at trial, it was not an improper subject for argument even though the trial court sustained an objection. *Isaacs* v. *United States,* 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818. Petitioner contends that the statement, in conjunction with a witness's earlier reference to a "Syndicate in Chicago," implied that the government attorney knew of some connection between petitioner and a nefarious criminal enterprise based in Chicago. As noted by the court below (Pet. App. 15), the context of the remark did not lend itself to such an interpretation. In addition, the trial court's explicit instructions to disregard the reference to orders from Chicago were sufficient to eliminate any problem on this score. *United States* v. *Frascone,* 299 F. 2d 824, 828 (C.A. 2), certiorari denied, 370 U.S. 910.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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